YOH MENG HENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) July 28, 1969]
[Penang — Criminal Appeal No. 23 of 1969]

Internal Security — Subversive document — Possession of — Particulars of charge — Charge not specifying in what manner document alleged to be subversive — Sentence — Internal Security Act, 1960, s. 29.

Criminal Law and Procedure — Charge — Particulars — Rebuttal.

Criminal Law and Procedure — Sentence — Sense of proportion when considering — Exercise of moderation.

The appellant was convicted on a charge of being found, without lawful excuse, to have in his possession a subversive document, to wit, a document titled "Is Malaya a Democratic Country? Is there Freedom of Assembly, Association, Speech, Publication, Strike, Demonstration etc." and that he had thereby committed an offence punishable under section 29(1) of the Internal Security Act, 1960. He was sentenced to a fine of $5,000 or in default 2 years imprisonment.

Held, allowing the appeal: it is essential that a person accused of an offence should be given sufficient particulars to know just what the charge against him is, so that he may rebut it; in this case the charge was embarrassing to the appellant in not having specified in what manner the document was alleged to be subversive and therefore the appellant was prejudiced in his defence.

Semble: The courts should exercise moderation keeping in mind a sense of proportion when considering sentence and take into account the surrounding circumstances. In this case it was a mockery to sentence a youth for an offence of this sort to a fine of $5,000 where it is clear that he would have difficulty even to find 1/10th of the amount.

Cases referred to:—

(1) *Low Oi Lin* v. *R.* [1949] M.L.J. 210.

MAGISTRATE'S CRIMINAL APPEAL.

R. Rajasingam for the appellant.

Abu Mansor bin Ali (Deputy Public Prosecutor) for the defendent.

Ong Hock Sim J. (delivering oral judgment): In this case, I will deal only with the 2nd charge as counsel for the defence agrees that he would not argue on the 1st charge, which is based on a technicality. The 2nd charge reads:—

"That you on 18.4.69 at about 6.30 a.m. at an unnumbered hut at Bertam Estate, Kepala Batas, in the District of Butterworth, in the State of Penang, were found, without lawful excuse, to have in your possession a subversive document, to wit a document titled "Is Malaya a Democratic Country? Is there Freedom of Assembly, Association, Speech, Publication, Strike, Demonstration etc." and that you have thereby committed an offence punishable under section 29(1) of the Internal Security Act No. 12 of 1960."

In this case, the appellant was apprehended while he was with a group of persons painting some writings on the roadside. On the next day, an inspector took him to his house where in a room, which his mother, a prosecution witness, admitted, was occupied by him, the publication entitled "Quotations from Chairman Mao" specified in the first charge and the alleged subversive documents were found. Translations were made of the pamphlets (P.2A) and produced in court. This was the only evidence adduced by the prosecution. It is not stated in the charge just how the pamphlets were classified as within the definition of a "subversive document" as defined in section 29 of the Internal Security Act. I do not need to say whether the provisions of the Internal Security Act over-ride or are merely complementary to the provisions relating to search contained in the Criminal Procedure Code (Cap. 21) which latter requires a list to be given. I quote section 68 of the Criminal Procedure Code:—

"68(1) A list of all things seized in the course of a search made under this Chapter and of the places in which they are respectively found shall be prepared by such officer or other person making such search and signed by him.

(2) The occupant of the place searched or some person in his behalf shall in every instance be permitted to attend during the search and a copy of the list prepared and signed under this section shall be delivered to such occupant or person at his request."

This, however, is not a search made under the Criminal Procedure Code. Section 30(1) of the Internal Security Act reads:—

"30(1) Any police officer not below the rank of inspector may, without warrant and with or without assistance:—

(a) enter and search any premises;

(b) stop and search any vehicle, vessel, train, aircraft or individual, whether in a public place or not,

if he suspects that any document, publication, material or article being evidence of the commission of an offence against this Chapter is likely to be found in such vehicle, vessel, train, aircraft or on such individual, and may seize any document, publication, material or article so found."

It will be noted that while it reads " . . . . in such vehicle, vessel, train, aircraft or on such individual" "premises" appearing in (a) has been omitted.

"Subversive document" is defined in subsection (3) of section 29 of the Internal Security Act as any document having in part or in whole a tendency:—

(a) to excite organised violence against person or property in the Federation; or

(b) to support, propagate or advocate any act prejudicial to the security of the Federation or the maintenance or restoration of public order therein or inciting to violence therein or counselling disobedience to the law thereof or to any lawful order therein; or

(c) to invite, request or demand support for or on account of any collection, subscription, contribution or donation, whether in money or in kind, for the direct or indirect benefit or use of persons who intend to act or are about to act, or have acted, in a manner prejudicial to the security of the Fede-

ration or to the maintenance of public order therein, or who incite to violence therein or counsel disobedience to the law thereof or any lawful order therein.

In my view, it is essential that a person accused of a charge should be given sufficient particulars to know just what the charge against him is, so that he may rebut it. It is embarrassing to the defence not to know just what he is alleged to have contravened. Is this document alleged to be one having a tendency to excite organised violence against person or property in the Federation? Is it to support, propagate or advocate any act prejudicial to the security of the Federation or the maintenance or restoration of public order therein or inciting to violence therein or counselling disobedience to the law thereof or to any lawful order therein; or to invite, request or demand support for or on account of any collection, subscription, contribution or donation, whether in money or in kind, for the direct or indirect benefit or use of persons who intend to act or are about to act, or have acted, in a manner prejudicial to the security of the Federation or to the maintenance of public order therein, or who incite to violence therein or counsel disobedience to the law thereof or any lawful order therein? I have earlier mentioned a drafting omission but I am not at all certain whether "or inciting to violence therein or counselling disobedience to the law thereof or to any lawful order therein" should be amended to read "or to incite violence therein or counselling disobedience to the law thereof or to any lawful order therein."

No evidence other than the translations of the pamphlets "Is Malaya a Democratic Country? Is there Freedom of Assembly, Association, Speech, Publication, Strike, Demonstration, etc." has been produced. How these are "subversive" as defined has not been specifically alleged.

The learned president has only this to say in his grounds of judgment:—

"As for the 2nd charge, on reading the translation of Exhibit P.2, in my opinion, I feel that these pamphlets are subversive in that they have the tendency to excite organised violence and counselling disobedience to law and as such they come under the ambit of section 29(3)(a) and (b) of the Internal Security Act 1960. As such the presumption under section 29(4) has not been rebutted. Accused must realised that the contents of P.2 has the tendency to incite violence and counselling disobedience to law, because the pamphlets expressly does this and any responsible citizen reading this would realise it."

I do not wish to be unduly critical of the indifference (forgetting grammatical errors) in which a judgment dealing with the liberty of a person has been made. I have underlined and mentioned what may have been an oversight in drafting. Here in the judgment the learned president used the words "to excite organised violence and counselling disobedience within the ambit of section 29(3)(a) and (b)." He says "Accused must realised that the contents of P.2 has the tendency to incite violence and counselling disobedience to law, because the pamphlets expressly does this and any responsible citizen reading this would realise it." By these words and his earlier words "In my opinion I feel", the learned president failed to decide the issue for himself. I rather agree with the learned president, Sessions Court, Kuala Lumpur, where he was reported in the issue of the *Straits Times* dated 26th July, 1969 as saying that he could not see how a pamphlet such as the one here can be held to be subversive in the absence of any law providing for compulsory voting.

Ratanlal's Law of Crimes shows that specimen charges relating to sedition should set out particulars by reference to the particular words of the law defining what is a seditious tendency.

In this respect I consider the second charge was embarrassing to the appellant in not having specified in what manner they are alleged to be subversive and the appellant was thereby prejudiced in his defence. The learned president in his grounds of judgment said:—

". . . . . on reading the translation of Exhibit P.2 in my opinion I feel that these pamphlets are subversive in that they have the tendency to excite organised violence and counselling disobedience to law and as such they come under the ambit of section 29(3) (a) and (b) of the Internal Security Act 1960."

In my view, he has not directed his mind to the issues, neither has he condescended to explain in his grounds of judgment why he considers these documents fall within section 29(3)(a) and (b) of the Internal Security Act.

I am unable, search diligently as I have, to find that there is any organised violence advocated in these documents or counselling or disobedience of any law. Section 29(4) reads:—

"Every document purporting to be a subversive document shall be presumed to be a subversive document until the contrary is proved; and where in any prosecution under this section it is proved that a person was carrying or had in his possession or under his control a subversive document he shall be deemed to have known the contents and the nature of the contents of such document."

The learned president has not chosen to give the appellant at least the satisfaction of knowing whether he was rightly convicted and, if so, for what offence. I do not therefore propose to order a retrial. I set aside the conviction on this charge.

One word now about the punishment which the learned president has seen fit to impose.

Section 29(1) of the Internal Security Act reads:—

"Any person who without lawful excuse carries or has in his possession or under his control any subversive document shall be guilty of an offence against this Part and shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand dollars, or to both such imprisonment and fine."

It is true that the maximum fine provided is ten thousand dollars. A fine of $5,000 in this case is manifestly excessive, having regard to all the circumstances, in the sense that a heavier fine entails a heavier default sentence and obviously the fine of $5,000 for a first offence here has the effect of a sentence of imprisonment for two years. The law provides for $10,000 fine or 5 years or both. It is a mockery to sentence a youth for an offence of this sort to a fine of $5,000 where it is clear that he would have difficulty even to find one-tenth of the amount. I have no hesitation in saying that the courts should exercise moderation keeping in mind a sense of proportion when considering sentence and take into account the surrounding circumstances. An arbitrary one-half of the maximum sentence is a wholly wrong principle to adopt and I would quote from the judgment of Taylor J., in *Low Oi Lin v. Rex*[1] at 211:

"I would add that it is very doubtful whether the principle of one-third of the maximum imprisonment was ever generally applied in the Supreme Court; .....

It is impossible to lay down rules for fixing sentences. There are certain factors such as prevalence, difficulty of detection and injury to the public revenue which operate in the direction of severity and others such as leniency to first offenders which operate in the other direction and where, as frequently happens, a number of these factors apply in one case the court must balance them as best as it can.

The sentence ought to be an individual one, personal to the prisoner himself, assessed with regard to his moral and financial circumstances as well as to the nature of his offence."

And I would add the courts should have greater regard for the offence, the circumstances of the case, the public interest and the reformation of the offender.

Appeal allowed.

Solicitors: *R. Rajasingam & Co.*

MAHADI v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) July 28, 1969]

[Ipoh — Criminal Appeal No. 27 of 1969]

Criminal Law and Procedure — Statutory presumption — Onus on accused person — Magistrate convicting accused on the ground that he did not believe the defence.

Criminal Law and Procedure — Re-trial — Circumstances under which it would be ordered.

The appellant had been charged with accepting a gratification of $25 an offence punishable under section 9(ii) of the Prevention of Corruption Act, 1961. The learned president convicted the appellant and in his grounds of decision stated that he believed the story of the prosecution and did not believe the defence given by the accused and therefore he found the accused guilty.

Held: (1) if the president did not believe the story of the defence he was nevertheless bound to consider whether the defence, though disbelieved by him, had not raised any reasonable doubt in his mind and as he had failed to do so the conviction must be quashed;

(2) where the prosecution has adduced all the evidence it has and the evidence has established a *prima facie* case against the accused which unrebutted would warrant his conviction, then, the failure of justice occasioned by the trial president in placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution.

Cases referred to:—

(1) *Public Prosecutor* v. *Yuvaraj* [1968] 1 M.L.J. 238, F.C.; [1969] 2 M.L.J. 89, P.C.

(2) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263.

(3) *Mohamed Yatin* v. *Public Prosecutor* [1950] M.L.J. 57.

(4) *Abdul Rahim* v. *King-Emperor* L.R. (1964) 73 I.A. 77.

MAGISTRATE'S CRIMINAL APPEAL.

N.H. Chan for the appellant.

M. Mahalingam (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J. (delivering oral judgment): The appellant, Mahadi bin Serja, a sergeant in the Royal Malaysian Police Force, was charged with accepting a gratification of $25, an offence punishable under section 9(ii) of the Prevention of Corruption Act, 1961.

At the close of the trial the learned president received the benefit of very detailed submissions by counsel for the accused and the Deputy Public Prosecutor, which moved him to thank both counsel for the way in which they had enlightened the court. Counsel for the accused in particular drew the court's attention to the decision in *Yuvaraj's*[1] case in which it was held that where the statutory presumption cast the burden of proof on the accused the accused must be held to have discharged his burden, if he merely raised a reasonable doubt. Despite the benefit of this advice from the Bar, the learned president, in his oral judgment, after reviewing the evidence said these words:—

"In short I believe the story of the prosecution and I do not believe the defence given by the accused. I find accused guilty of the charge and I convict him."

When I came to read his grounds of judgment, the learned president repeated almost verbatim what he said. He wrote:—

"In this case I believe the story of the prosecution and I do not believe the defence given by the accused and as the case stands I find the accused guilty of the charge and I convict him."